

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott  
Edward A. Garvey  
Marshall Johnson  
LeRoy Koppendrayer  
Phyllis A. Reha

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of a Petition by Northern States  
Power Company d/b/a Xcel Energy for Review  
of its Phase IV Request for Proposals for Wind  
Generation

ISSUE DATE: February 11, 2002

DOCKET NO. E-002/M-00-622

ORDER ALLOWING THE BIDDING  
PROCESS TO PROCEED AND DIRECTING  
DISCUSSIONS TO IMPROVE  
COMMUNICATIONS

**PROCEDURAL HISTORY**

On June 23, 2000, Xcel filed its Request for Proposal (RFP) for 80 MW of wind generation. This RFP was issued to select a project to complete the final 80 MW of wind (Wind Phase IV) required by the wind mandate of 425 MW.<sup>1</sup>

Xcel's competitive bidding process, approved by the Commission, requires Xcel to file with the Commission and serve on the parties its short-list selection, including a report justifying its selection. On March 26, 2001, Xcel selected two of the nine bids from the Phase IV process for further consideration and evaluation. However, the Company did not file a short list selection with the Commission or the Department of Commerce (Department) and on April 5, 2001, Xcel announced its final selection. Over six months later Xcel filed its final selection (report and certification) with the Commission on September 27, 2001.

On October 29, 2001, the Department filed comments on Xcel's final selection with the Commission.

On November 9, 2001, Xcel filed comments in response to the Department.

The matter came before the Commission on November 29, 2001.

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<sup>1</sup> The requirement that Xcel (formerly NSP) develop a certain level of wind generation on a specific timetable (the wind mandate) is set forth in Minn. Stat. 216B.2423, subd. 1.

## **FINDINGS AND CONCLUSIONS**

### **I. XCEL'S (FORMERLY NSP'S) APPROVED COMPETITIVE BIDDING PROCESS**

On August 25, 1998, the Commission issued an Order adopting the Minnesota Department of Public Service's, now the Minnesota Department of Commerce (the Department's) recommendation to approve Northern States Power Company's (NSP's or the Company's) proposal to revise its competitive bidding process, with one modification: that the time period to request an investigation of the final selection was set at 30 days rather than 15 days as proposed by NSP.<sup>2</sup>

In subsequent Orders dated September 29, 2000 and February 7, 2001 in Docket No. E-002/M-99-888, the Commission clarified that as a result of the Commission's August 25, 1998 Order, the approved competitive bidding process consisted of the following five steps:<sup>3</sup>

- Step 1: One-time Commission approval of a list of auditors (evaluators). NSP may add auditors to the list upon notifying the Department, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), collectively the Parties, and the Commission. No approval will be required, but the additions could be challenged by the Parties.
- Step 2: NSP will file a proposed Request for Proposals (RFP) with the Commission and serve it on the Parties. Absent a request for investigation by any party, NSP may issue the request for proposals (RFP) to potential bidders 30 days after the filing without Commission approval.
- Step 3: NSP will file with the Commission and serve on the parties its short-list selection including a report justifying its selection. A party may challenge the selection within 15 days upon showing that a bidder was erroneously omitted from the list due to significant unfairness.

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<sup>2</sup> See *In the Matter of a Request by Northern States Power Company to Modify its Competitive Bidding Process*, Docket No. E-002/M-98-646, ORDER (August 25, 1998).

<sup>3</sup> See *In the Matter of the Petition of Northern States Power Company for Review of its 1999 All Source Bid Request Proposals*, E-002/M-99-888, ORDER GRANTING INTERVENTION (September 29, 2000), pages 1-2 and ORDER REJECTING REQUESTS FOR FURTHER INVESTIGATION, APPROVING FINAL BID SELECTIONS, AND OPENING DOCKET REGARDING EXTERNALITY VALUES (February 7, 2001), pages 1-2.

- Step 4: NSP will file its final selection of vendor(s), a report justifying the selection, and a certification by the auditor that NSP's selection process was fair with the Commission and serve it on the parties. A party may request investigation of NSP's final selection within 30 days and the Commission may initiate an investigation within 30 days.
- Step 5: The Commission must approve the final Power Purchase Agreement (PPA) between NSP and the winning vendor(s).

## **II. XCEL BIDDING PROCESS ACTIONS**

On June 23, 2000, Xcel filed its Request for Proposal (RFP) for 80 MW of wind generation.

On March 26, 2001, Xcel selected two of the nine bids from the Phase IV process for further consideration and evaluation but did not file a short list selection (and a report justifying its selections) with the Commission or the Department of Commerce (Department), as required by its Commission-approved bidding process.

On April 5, 2001, Xcel announced its final selection and filed its final selection (report and certification) with the Commission on September 27, 2001. In its filing, the Company sought Commission approval of its final selection, Chanarambie Power Partners, LLC (Chanarambie). The Company also sought approval of its decision to deviate from its approved bidding process.

## **III. THE DEPARTMENT'S COMMENTS**

The Department noted that Xcel had not complied with the Commission Orders which had clearly required it to file a short-list selection and report justifying its selection, Step 3 of the approved bidding process, as set forth above. The Department stated that the Company had provided no reasonable explanation for its failure to do so.

The Department concluded, however, that despite this failure Xcel's final selection of Chanarambie was appropriate and recommended that the Commission allow the process to continue with Xcel's final selection of Chanarambie. In reaching its recommendation, the Department confirmed the numerical scoring that was the basis for the final selection of the Chanarambie project and noted that no bidders or interested persons have filed objections to the final selection. The Department concluded that the final selection was appropriate and in the public interest.

Regarding Xcel's non-compliance with Step 3, however, the Department recommended that the Commission issue an Order to Show Cause requiring Xcel to file, within 30 days, any reasons why the Commission should not find that the Company knowingly and intentionally violated the Commission's Order in Docket No. E-002/M-98-646. The Department analyzed and rejected all explanations offered by the Company for not performing Step 3.

## **V. COMMISSION ANALYSIS**

### **A. Unilateral Action Without Seeking Variance**

The Commission does not accept the Company's explanation that the Commission Order accepting Xcel's bidding process did not require adherence to each step of the process. The Commission's August 25, 1999 Order in Docket No. E-002/M-98-646 adopts the bidding process that the Company proposed and directed the Company to use it. And in subsequent Commission Orders in Docket No. E-002/M-99-888 (cited above in footnote 3), the Commission clarified the five specific steps of the process and made it abundantly clear that each step of the process is mandatory.

The February 7, 2000 Order in Docket No. E-002/M-99-888 clearly stated:

As a result of the Commission's August 25, 1998 Order, the approved competitive bidding process consisted of the following five steps: . . .

[. . . reiteration of the five steps is omitted. . .]

No language in these Orders gave the Company authority to disregard, at its own discretion, any bid process steps that it concluded were unnecessary.

While it does appear that the Commission would have allowed the Company to skip Step 3 if the Company had asked for permission to do so, this certainly does not absolve the Company of the infraction of proceeding unilaterally, i.e. without asking for and receiving from the Commission a variance from the Order's clear mandate (Step 3).

In the circumstances of this bidding process, however, and given the clarification, warning, and corrective directions provided in this Order, the Commission will exercise its discretion and deny the Department's request for an Order to Show Cause. The Commission will not require the Company to file a statement explaining why it should not be found to have knowingly and intentionally violated the Commission's Order.

In so doing, however, the Commission issues stern advice to the Company to take heed of a basic element of the regulatory arrangement, i.e. that no utility company has the authority to determine which Commission directives it will follow and which it will deem unnecessary and disregard. In the context of the prescribed bidding process, the Company has a particular responsibility to act in strict accord with Commission directives, since the success of the process relies to a great extent upon bidders' confidence in the fairness of the process.

## **B. Delayed Communication of Final Selection**

In addition to the Company's non-compliance with Step 3 addressed above, the Company did not communicate its final selection (Chanarambie) to the Commission, did not file its final selection report until September 27, 2001, and did not substantially communicate with Commission Staff regarding the reasons for the delay (almost six months after it had actually selected Chanarambie and announced its selection to the news media) in filing the final selection report. This lengthy period of non-communication and delay places the Company's willingness to maintain appropriate communications with the Commission and the Department in question and unreasonably jeopardizes the process.

Although this delay in filing the selection report did not violate a Commission Order as such and has been subsequently adequately explained by Xcel, the Commission is concerned that this experience may indicate inadequate concern by the Company for maintaining appropriate communications with the Commission and the Department on substantial aspects of the bidding process. These communication problems and what they portend for the future of the bidding process if left unaddressed pose an unreasonable risk of detracting from the appearance of fairness of the bidding process, so essential to its ultimate success.<sup>4</sup>

The Commission, therefore, will formally direct the Company to pursue discussions with the Commission Staff and the Department on how to improve communications on the status of the bidding process (the 5 Steps) and contract negotiations.

### **ORDER**

1. Xcel is hereby authorized to proceed with the Wind Phase IV bidding process, with the clarification that the Commission will consider approving the Company's final selection of the Chanarambie project as part of the review of the Xcel-Chanarambie Power Purchase Agreement (PPA).
2. The Department of Commerce's request for an Order to Show Cause is denied.
3. Xcel shall pursue discussions with Commission Staff and the Department on improving communications on the status of bidding and contract negotiations.

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<sup>4</sup> The Commission notes that concern to promote adequate attention to appropriate communication in support of maintaining the integrity and transparency of the bidding process is the basis for both issues addressed in this Order: 1) the Company's failure to request a variance to its Order before skipping Step 3 of the bidding process and 2) nearly six months silence regarding its final selection.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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